



Signed: April 13, 2009

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 08-47449 T
COLLINS A. MBANUGO, Chapter 11
Debtor-in-Possession.

MEMORANDUM RE PLAN AND DISCLOSURE STATEMENT

The hearing on the disclosure statement filed by the above-captioned debtor on March 10, 2009 is scheduled for hearing on April 16, 2009 at 11:00 a.m. A final hearing on a motion for relief from stay filed by PR Investor Services, Inc. and Meridian Mortgage Investors Fund VII, LLC (collectively "PR/Meridian") is scheduled for May 22, 2009. At the preliminary hearing, the Court advised the debtor that it had taken a quick look at the disclosure statement and concluded that it could not be approved in its present form. The Court had not at that time had an opportunity to review the plan and disclosure statement carefully. The Court has

2 now read the plan and disclosure statement carefully, and
3 objections have been filed to the adequacy of the disclosure
4 statement. The Court issues this Memorandum to advise the parties
5 of its proposed rulings.

6 **A. DEFECTS IN DEBTOR'S PLAN**

7 1. There is no class created for the debtor's equity in the
8 estate. The debtor's equity interest must be classified and the
9 class designated as unimpaired.

10 2. The proposed treatment of the unclassified IRS claim is
11 improper. Under BAPCPA, such claims must now be paid within five
12 years from the petition date.

13 3. Paragraph 11.4 on page 13 states that the debtor reserves
14 the right to seek confirmation notwithstanding the rejection of the
15 plan by one or more classes of creditors. This statement is
16 misleading. Because the plan does not commit to paying unsecured
17 claims in full with post-petition interest and the debtor is
18 retaining his equity interest in the estate property, the plan may
19 not be confirmed over the rejection of Classes J and K.

20 **B. DEFECTS IN DEBTOR'S DISCLOSURE STATEMENT**

21 1. The liquidation analysis is inadequate. The debtor must
22 list each item of real property and each category of personal
23 property and estimate the liquidation value of each. From each
24 value, the debtor must deduct, as appropriate, the cost of
25 liquidation, the secured debt, and the amount of any exemption.
26 The net liquidation value of each item or category should then be

2 totaled and from that deducted the estimated chapter 7 expenses,
3 next, the estimated chapter 11 expenses, and the estimated priority
4 claims. The balance should then be compared with the estimated
5 total of unsecured claims. The value of any potential lawsuits
6 must be included in this analysis. The discussion should also
7 disclose the time within which the proceeds of the liquidation are
8 likely to be distributed. This should be compared to the amount
9 and time frame of the proposed distribution under the plan.

10 2. The feasibility discussion is inadequate. It contains no
11 real factual information, just self-serving expressions of
12 optimism. If the feasibility depends primarily on the debtor's
13 future salary from his medical practice, more concrete information
14 must be provided about the estimated revenues he anticipates
15 receiving. These must be compared to the amounts that he proposes
16 to pay under the plan. If the feasibility of those amounts cannot
17 be justified based on his recent earnings, justification must be
18 provided in some other way, e.g., what were his net revenues before
19 he allowed his medical practice to "drift"?

20 If the feasibility depends primarily on revenues from the sale
21 of real property, the disclosure statement should discuss in detail
22 what efforts the debtor has made to date to sell the real property
23 and when he expects any sales will be concluded.

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2 **C. CREDITORS' OBJECTIONS**

3 **1. Objections by Alcoa, Inc.**

4 Alcoa objects to approval of the disclosure statement on two
5 grounds:

6 a. Alcoa objects to the statement in the disclosure statement
7 that it was a prior owner of the land containing an abandoned
8 sulfur mine.

9 The Court has no basis at present to determine whether this
10 statement is correct or incorrect. If the issue is in dispute,
11 evidence should be provided sufficient to resolve the dispute or
12 the existence of the dispute should be disclosed in the disclosure
13 statement.

14 b. Alcoa objects to the disclosure statement on the ground
15 that it gives the impression that the \$420,000 to be paid to
16 unsecured creditors by the debtor will be sufficient to pay those
17 claims in full. Alcoa notes that the plan provides that the
18 Remediation Agreement, which the debtor entered into with Alcoa,
19 will be rejected. Alcoa asserts that the rejection claims that
20 would arise as result of the rejection might exceed \$2 million.

21 This objection has merit and will be sustained. The
22 disclosure statement would have to be amended to eliminate this
23 false impression and to discuss the anticipated range of the
24 rejection claims.

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26 **2. Objections by PR/Meridian**

2 PR/Meridian makes the following objections to the disclosure
3 statement:

4 a. PR/Meridian contends that the disclosure statement does
5 not adequately disclose the facts relating to the pre-petition
6 events leading up to the bankruptcy filing. It notes that the
7 disclosure statement fails to disclose the debtor's default on
8 Meridian's secured claim and the fact that, before filing for
9 bankruptcy, the debtor filed a state court action and sought a
10 preliminary injunction of the foreclosure action, which was denied.
11 It notes that the debtor has also not disclosed whether he is in
12 default on his other secured obligations.

13 This objection will be sustained. Since the disclosure
14 statement discloses that the bankruptcy was filed to stop a
15 foreclosure by PR/Meridian, the failure to expressly disclose a
16 default is nonmaterial. However, the history of the state court
17 action should be disclosed, and the debtor should disclose whether
18 he is in default on his other secured obligations and, if so, to
19 whom and in what amounts.

20 b. PR/Meridian contends that the disclosure statement does
21 not adequately disclose the facts relating to the debtor's
22 activities and condition since filing for bankruptcy. It notes
23 that the only information provided is that the debtor is a surgeon
24 and is taking steps to increase his medical practice. It contends
25 that more concrete information concerning his income from his
26 medical practice is necessary. It also notes that there is no

2 information concerning what progress he has made in obtaining
3 approvals from the City of Oakland.

4 This objection overlaps with one of the defects noted by the
5 Court and will be sustained.

6 c. PR/Meridian contends that the disclosure statement does
7 not provide an adequate summary of the plan.

8 The substance of this objection goes to the inadequate
9 discussion of feasibility. Therefore, this objection will not be
10 sustained as a separate ground.

11 d. PR/Meridian contends that the disclosure statement does
12 not adequately describe the proposed impairment of Meridian's
13 claim. It contends that the disclosure statement is unclear as to
14 whether its claim is impaired. According to PR/Meridian, it does
15 not state whether it will retain its lien, whether additional
16 collateral will be provided, how it arrived at an 8% interest rate,
17 and how its interest rate would accrue and/or be paid.

18 This objection will be overruled. The plan states with
19 sufficient clarity the proposed treatment of the PR/Meridian claim,
20 including that PR/Meridian will retain its lien. The disclosure
21 statement need not repeat this information and need not disclose
22 that it does not intend to provide additional collateral. The
23 adequacy of the interest rate is a confirmation issue. No
24 disclosure is required at this time of how the debtor arrived at
25 this interest rate.

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2 e. PR/Meridian contends that the disclosure statement does
3 not adequately discuss the feasibility of the plan and that the
4 liquidation analysis is inadequate.

5 This objection mirrors the Court's own notation of defect.
6 The objection will be sustained.

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